APPENDIX

Memorandum of Opinion and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

FORT WAYNE DIVISION

Civil No. 72 F 5

INDIANA CONSUMERS AND WORKERS UNION, an unincorporated association, *et al.*,

Plaintiffs,

—v.—

KENNETH SWAIM, individually and in his capacity as Manager of the Fort Wayne Branch of the Indiana Employment Security Division, *et al.*,

Defendants.

The Indiana Consumers and Workers Union (hereinafter ICWU), an unincorporated association, and certain named plaintiffs, on behalf of themselves and as representatives of a class of all unemployed workers in Indiana, bring this action seeking injunctive and declaratory relief as authorized by 42 U.S.C. §1983 and 28 U.S.C. §§2201, 2202. Jurisdiction of this court is based on 28 U.S.C. §§1343(3) and 1343(4). This cause is presently before the court upon plaintiffs' application for a preliminary injunction restraining the defendants from refusing to allow

plaintiffs and members of the class they represent to enter the Fort Wayne Branch Office of the Indiana Employment Security Division (hereinafter IESD) during regular office hours to speak with other unemployed workers and to distribute their printed material. An evidentiary hearing was held before this court on April 27, 1972 in Fort Wayne, Indiana. This court has concluded that plaintiffs and members of the class they represent will suffer irreparable harm if a preliminary injunction is not issued in that plaintiffs will be denied their First Amendment rights to communicate effectively with other unemployed workers in this branch office of the IESD. This court further finds that plaintiffs have a probability of success on the merits, and a preliminary injunction is necessary to preserve plaintiffs' exercise of those First Amendment rights.

The ICWU is an association organized on or about January 13, 1972, whose stated aims and purposes are to make unemployed workers aware of their rights and benefits under the Indiana Employment Security Act, to make constructive changes in that Act, and to assist unemployed workers in enforcing these rights. The named individual plaintiffs were all members of the ICWU and were all unemployed at the time this action was filed. The court finds that there are common questions of law and fact affecting the rights of the plaintiffs and members of the class they represent and common relief is sought by all; that members of the class are so numerous as to make joinder of all members impossible; and that the interests of the class will be adequately represented by the named plaintiffs. This court therefore finds that this action may be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(3), and the class properly represented here are all unemployed workers in the State of Indiana.

The plaintiffs attack the policy of the named defendants, individually and in their capacity as directors, managers, and agents of the Indiana Employment Security Division, in prohibiting them from speaking with and distributing printed material to the unemployed workers in the IESD branch office. The branch office of the Indiana Employment Security Division located at 505 West Washington Boulevard, Fort Wayne, Indiana, is dedicated to public use and is the office where unemployed workers must report weekly to make themselves available for work and pick up their benefit checks.

Plaintiffs, at the outset of the evidentiary hearing, brought to the court's attention the defendants' failure to respond to plaintiffs' request for admissions filed on February 24, 1972 and served upon the defendants March 1, 1972. Plaintiffs ask this court to deem those requests admitted as provided in Fed. R. Civ. P. 36(a). Defendants argue in opposition to this request that they understood they had until April 26, 1972 to respond to those requests. On reviewing the file, however, it is clear that defendants were to respond to those requests by at least April 21, 1972. Moreover, even assuming the defendants had until April 26, 1972 to file those admissions, the admissions would not be timely inasmuch as defendants have yet, as of the date of this opinion, to respond to that request. Plaintiffs have made timely and good faith responses to all discovery sought by the defendants, while the defendants have not responded to one request by the plaintiffs, nor have they seen fit to file an answer in this cause. The court therefore holds that plaintiffs' requests for admissions filed February 24, 1972 are deemed admitted and conclusively binding on these defendants for the purposes of this action. (It should be noted, however, that the uncontroverted evidence

disclosed during the hearing in this matter conforms substantially to what plaintiffs had sought by way of admission.)

On January 24, 1972, at approximately 9:30 a.m., four members of the ICWU, Fred Olson, Cipriano Torres, Terry Giese, and Frederick Dey, entered the Fort Wayne branch of the IESD for the purpose of talking and distributing fliers to claimants waiting in the various lines. After talking and handing fliers to a few claimants, the plaintiffs were asked to leave immediately by defendant Bowman, an employee of the Indiana Employment Security Division. Mr. Bowman stated that he was acting pursuant to orders from the main office in Indianapolis, Indiana. Plaintiffs thereupon left immediately in a peaceful manner.

That afternoon, a letter was delivered to defendant Swaim, the manager of the Fort Wayne branch of the IESD, asking him to reconsider his position and allow plaintiffs to enter the lobby for the purpose of distributing fliers and talking to claimants. On the following day, January 25, 1972, and on January 26, 1972 at approximately the same time as on January 24, 1972, plaintiffs returned to the IESD office and the same events occurred, i.e., after talking to a few claimants, they were asked to leave and they did so peacefully.

On all three occasions listed above, the plaintiffs would enter the building and talk to claimants who were standing in one of the four lines waiting to be served by employees of the defendants. Plaintiffs at all times remained in the lobby or waiting room of the Fort Wayne branch; they created no disturbance and did not interfere in any way with the function of that office. They talked and gave fliers only to those claimants who consented.

There was evidence presented that when four lines are waiting to be served, the plaintiffs must go between the lines to talk to claimants, and this will force claimants who are leaving the front desk to step around one of the plaintiffs. However, this will occur only when four lines are waiting to be served, and the testimony indicates that four or five lines are present only during peak periods. Moreover, there was no evidence presented demonstrating that this slight inconvenience to a claimant would in any way interfere with the function of that office.

Because of the correlation between the physical size and design of the office in question and the degree of obstruction these plaintiffs' presence would have on that office, the court, with the consent of all parties, visited the Fort Wayne Branch Office of the IESD and made the following observations: The office has one public entrance located on Clay Street. There is an inclined hallway leading to the main claims office or waiting room. The hallway makes one right angle turn, and at its widest point is six feet ten inches, and five feet six inches at the narrowest point. The claims waiting area where plaintiffs wish to talk to claimants and pass out their fliers is a square room of approximately twenty-eight feet by twenty-eight feet, discounting a two-foot area on two sides of the room, which area is taken up by chairs along the outer walls of the room. Although at the time of this court's view of the premises, the office was virtually unoccupied, even upon visualization of the room with four lines of claimants, this court cannot see how plaintiffs limited activities would interfere with the function of that office.

Plaintiffs rely heavily upon *Unemployed Workers Union* v. *Hackett,* 332 F. Supp. 1372 (D.R.I. 1971) and cases cited therein for the proposition that their activities are permis-

sible and are protected by the First Amendment. The only factual differences between *Hackett, supra,* and the case before this court is the presence of a much larger room in Hackett[1] and the existence of three entrances in that case. This court agrees with much of what Judge Pettine said in the *Hackett* opinion, but, because of the somewhat differing factual context, a few observations are in order.

From the statement of aims and the information printed upon the fliers sought to be distributed by the ICWU, it is clear that they hope to assist other unemployment compensation recipients in understanding the system and to gain support in making what they believe would be improvements in that compensation system. Plaintiffs' activity in peacefully pamphleteering to gain those objectives is protected by the First Amendment. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971). *See also, Martin* v. *City of Struthers,* 319 U.S. 141 (1943); *Lovell* v. *City of Griffin,* 303 U.S. 444 (1938). Moreover, as the court in *Hackett, supra,* noted, the right of these unemployed workers to associate to further their interests, albeit those interests are not clearly "political," is also protected activity under the First Amendment. *Hackett, supra* at 1376. *See generally United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217 (1967); *NAACP* v. *Button,* 371 U.S. 415 (1963).

Essential to a finding that plaintiffs' activities here in question are permissible is a conclusion that the IESD branch office is a "public forum" for the exercise of plaintiffs' limited activities. Public forums have been found to

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[1] The court in Hackett found the unemployment office there to be 20,000 square feet. However, from that opinion, it is unclear whether or not this was the total office space or only the claims waiting area.

exist for the exercise of restricted First Amendment activities in streets, *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); in bus terminals, *Wolin* v. *Port of New York Authority,* 392 F.2d 83 (2d Cir. 1968), *cert. denied,* 393 U.S. 940 (1968); in shopping centers, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza,* 391 U.S. 308 (1968); in welfare offices, *Welfare Rights Organization* v. *Ott,* 421 F.2d 525 (1st Cir. 1969); and to a very limited extent in the classroom, *Tinker* v. *Des Moines Independent School Community,* 393 U.S. 503 (1969).

The inquiry made by the court in *Wolin* v. *Port of New York Authority, supra,* in determining whether or not a bus terminal which also served as a public passageway was a public forum for the activity here in question, was as follows:

> Does the character of the place, the pattern of usual activity, the nature of its essential purpose, and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance. *Wolin, supra* at 89.

This court finds the inquiry offered in *Wolin, supra,* to be somewhat broad in this context. The inquiry should be narrowed to ask not whether the standards offered in *Wolin, supra,* make the forum an appropriate place for the communication of views on issues of political and social significance in general, but whether or not those standards make it an appropriate forum for the type of communication presently under scrutiny. By "type" of communication, the court would include both the relevance of the substance of the communication to the function of the premises and the activity associated with that form of communication.

The character of the branch office in question here makes it the most appropriate forum for plaintiffs' attempted activities. Plaintiffs are attempting to educate unemployed workers regarding their rights under the Indiana Employment Security Act, and the most logical place to find and instruct those workers would be the Indiana Employment Security Division office. Moreover the activity associated with the form of communication here is peaceful pamphleteering, which is an appropriate form of communication for an office of the size and function here in question.

Although plaintiffs' activity is protected by the First Amendment and the IESD branch office is an appropriate public forum for these activities, the State, nevertheless, may regulate the exercise of those rights so as to prevent interference with the use to which the property is ordinarily put by the State. *See Amalgamated Food Employees, supra; Note, Regulation of Demonstrations,* 80 HARV. L. REV. 1773 (1967). The extent, if any, to which a state may regulate these rights turns basically upon a weighing process where the interests of the State in continuing the function of the IESD unhampered by interference must be considered. *See Cox* v. *Louisiana No. 24,* 379 U.S. 536, 554-5 (1965). This court recognizes that waiting rooms are not traditional fora for the exercise of First Amendment rights, and that a high degree of peace and order is necessary to their operation. Because of this recognition, the court closely examined the effect plaintiffs' pamphleteering and speaking to other claimants had on the operation of the office. Yet, from all the evidence adduced at the hearing, this court found plaintiffs' activity had a *de minimis* effect on those operations.

This court does not intend, however, to allow plaintiffs' exercise of those rights to remain completely unrestricted.

The size and nature of the forum here necessitates that certain precise and narrowly drawn restrictions be placed upon those rights, which restrictions shall be included in this court's preliminary injunctive order.

Therefore, this court finds that unless a preliminary injunction is granted, these plaintiffs and the class they represent will suffer irreparable harm in that they will be denied their right to communicate with their fellow workers effectively, as protected by the First Amendment and made applicable to the states through the Fourteenth Amendment to the United States Constitution.

The foregoing will constitute this court's findings of fact and conclusions of law as required by FED. R. CIV. P. 65(d) and 52(a).

PRELIMINARY INJUNCTION

For the above reasons it is hereby ordered:

Kenneth M. Swaim, individually and in his capacity as Manager of the Fort Wayne Branch of the Indiana Employment Security Division; William Bowman, individually and in his capacity as an employee at the Fort Wayne Branch of the Indiana Employment Security Division; John F. Coppes, individually and in his capacity as Director of the Indiana Employment Security Division; Van Smith, Max Wright, Albert Summers, Richard O. Ristine, and William H. Andrews, individually and in their capacities as members of the Indiana Employment Security Board; and all persons in active concert and participation with them are enjoined from refusing to allow plaintiffs and all other unemployed workers in Indiana to enter the Indiana Employment Security Division branch office at 505 West Washington Boulevard, Fort Wayne, Indiana, during regular business hours to speak with other unemployed workers

and to distribute literature or printed material in that area of the office known as the main waiting room or in the hallway leading up to the main waiting room. Provided, that plaintiffs and the class they represent will not place more than one member of their class in that office at any one time whose purpose is to distribute literature or speak with other claimants; that plaintiffs will discard properly or remove all printed material which they have distributed and which has been discarded by those to whom it was given; that plaintiffs or other members of their class, when so present in the above-mentioned office, will in some effective manner clearly designate themselves as not being agents, employees, or representatives of the Indiana Employment Security Division.

In the event a final judgment is in favor of the defendants, the injury to them by reason of the entry of a preliminary injunction will be minimal or nonexistent. Therefore no bond or security shall be required of the plaintiffs.

The motion for preliminary injunction is granted pending entry of a final judgment.

Entered this 18th day of May, 1972.

[Signature Illegible]

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United States District Judge